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Supreme Court, U.S.
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NO. 87-1775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN CASUALTY COMPANY OF READING PENNSYLVANIA,

Petitioner,

v.

ATLANTIC PERMANENT FEDERAL SAVINGS & LOAN ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 87-1775

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA,
Petitioner,

v.

ATLANTIC PERMANENT FEDERAL [1]
SAVINGS & LOAN ASSOCIATION,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR
WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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[1]. Pursuant to Rule 28.1 Respondent states that it has no parent company and no subsidiaries other than wholly owned subsidiaries.

REASONS FOR DENYING THE WRIT

1. There Is No Issue Subject To Review Under Rule 17.

This case involves nothing more than the application of principles of State law to the interpretation of an insurance policy. Based upon rules of construction enunciated by the Supreme Court of Virginia, the Court of Appeals for the Fourth Circuit affirmed the trial court's decision that the insured savings and loan association was entitled to proceed as subrogee to its officers under Clause A of its Directors' and Officers' Liability Policy. In a footnote to its opinion, the Court of Appeals suggested that the Association was not entitled to recover under Clause B of its policy because it had failed to observe certain procedural requirements of the Federal

Home Loan Bank Board. It is upon this footnote that the Petitioner bases its petition for a writ of certiorari.

The decision of the Court of Appeals is not in conflict with a decision of any other circuit or with any decision of the Supreme Court of Virginia, and it does not pose a conflict with any decision of this Court or decide any unsettled question of Federal law which should be resolved by this Court.

2. The Directors' and Officers' Liability Policy and Federal Regulations.

The Directors' and Officers' Liability Policy contains two insuring clauses. Clause A provides coverage to the Association's officers and directors and Clause B provides direct coverage to the Association. Anyone seeking to recover under Clause A is subject to

certain significant exclusions which are not applicable to anyone seeking to recover under Clause B. Thus, the route to recovery can be more difficult under Clause A.

Neither Clause A nor B makes any reference to Federal regulations. Any such reference is inferential by reason of the language of Clause B which provides that an association may recover directly for "all Loss for which the Association has, to the extent permitted by law, indemnified the Directors and Officers." The phrase "as permitted by law" is presumed to refer to the procedures for indemnification specified by the Federal Home Loan Bank Board (FHLBB).

An association seeking to recover as a subrogee under Clause A would be faced

with the policy exclusions, whereas an association seeking to recover as a direct insured under Clause B would be subject to the provision that its indemnification procedures be "as permitted by law." Here, the Association alleged a right to recover under both Clauses A and B.

In interpreting the policy, both the trial court and the appellate court found nothing to prohibit an association from seeking a recovery as subrogee under Clause A. The Court of Appeals simply reasoned that under State law any ambiguities were to be resolved favorably to the insured and that if the insurer, which drafted and marketed the policy, had intended to restrict an association's right to recover as subrogee under Clause A, it need only have redrafted the

language of its policy. (Pet. App. 16a-17a).

The insured was entitled to rely upon the language of the policy as it was written. It is reasonable to assume that if American Casualty had written its policy differently so also might Atlantic Permanent have effected its officers' indemnification differently.

The regulations upon which the Petitioner relies were promulgated pursuant to the Home Owners' Loan Act of 1933, 12 U.S.C. §1461 et seq. The enforcement of the Act and any regulations issued under the Act was entrusted to the FHLBB. 12 U.S.C. §1464(d)(1).

The specific regulations to which the Petitioner has made reference appear at 12 C.F.R. §545.121. These regulations

require such things as 60 days notice to the FHLBB prior to indemnification and an agreement with the officer seeking assistance that he will make restitution if later found not to be entitled to indemnification. The procedures for indemnification employed by Atlantic Permanent, although not consistent with the letter of the regulations, were expressly sanctioned by the FHLBB, as evidenced by letter of September 29, 1986 from Supervisory Agent, Robert J. Cohrs, to the Chairman of Atlantic's Board. (Res. App. 1a).

These regulations obviously were not written for the benefit of the insurance industry and the FHLBB was entitled to waive its indemnification procedures to whatever extent it chose to do so. The regulations were for the benefit of the

public in general and, more specifically, for the benefit of the stockholders and depositors of the affected Federal associations.

Given the language of the Policy and the nature and purpose of the FHLBB regulations, it is difficult to conceive of any preemptive provision which would alter the coverage available to an insured under State law.

3. The Preemption Provision of the FHLBB Regulations

The preemption provision upon which Petitioner relies is relatively narrow.

> The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in section 5(a) of the Home Owners' Loan Act of 1933. 12 U.S.C. 1464, as amended. This

> exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of a Federal association.

12 C.F. R. §545.2. The FHLBB preemption is designed to avoid a conflict with state statutes expressly undertaking to regulate Federal associations. There is nothing in the language of the regulations which would suggest that it was intended, in any context, to abrogate the common law of the State in which an association does business. On the contrary, the words of the regulation, "purporting to address the subject of the operations of a Federal association," clearly indicate that State law is preempted only to the extent that it attempts to govern the operations of a Federal association.

The limited purpose of this particular preemptive provision is evident when compared with the more expansive preemptive provisions in other areas of Federal regulation, i.e. the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq.

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. (Emphasis added)

29 U.S.C. §1144(a).

Seeking grounds for a writ under Rule 17, Petitioner suggests that the decision of the Court of Appeals will result in a conflict among the Circuits. In support of its position, Petitioner

cites three cases,[2] each of which involved a wrongful death action based upon an alleged failure of a cigarette manufacturer to give adequate warning of the dangers of smoking. In each instance the defense raised the preemptive provisions of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §§1331-1341. There, the preemption is statutory, not regulatory, and it is both specific and comprehensive.

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

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[2] Palmer v. Liggett Group, Inc., 825 F.2d 260 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), cert. denied 107 S.Ct. 907 (1987).

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334. The Congressional declaration of policy and purpose in passing the Act is also specific, and it deals directly with the issues involved in the cited cases.

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--
>
> > (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. §1331. These provisions afford no reasonable basis for analogy to this case. Here, the preemptive provisions are regulatory; they do not go to the substance of the dispute between the parties and they are limited in scope to "state law purporting to address the subject of the operations of a Federal association." 12 C.F.R. §545.2

Under the canons of construction, a basic assumption must be made that there was no intention to displace State law. Maryland v. Louisiana, 451 U.S. 725, 746 (1981). This is particularly true when the claim of preemption is based upon

Federal regulations; agencies generally address a topic in far greater detail than Congress. Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 718 (1985).

Even in cases involving statutory preemptive provisions, the Courts have declined to preempt State law in absence of explicit preemptive provisions. Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir. 1984), cert. denied 469 U.S. 1062 (1984). In Ferebee, the Court of Appeals for the District of Columbia held that the preemptive provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 et seq., did not preclude an action under State law for wrongful death resulting from an alleged inadequate warning label, despite EPA approval of the label and the fact

that the Act provided that a state "shall not impose or continue in effect any requirements for labeling...in addition to or different from those required under this subchapter." 7 U.S.C. §136V(b). "First, Congress has not explicitly preempted state damage actions; it has merely precluded states from directly ordering changes in the EPA-approved labels." Ferebee, supra at 1542.

A succinct statement of this Court's position on preemption by Federal regulation appears in Florida Avocado Growers v. Paul, 373 U.S. 132, 142, reh'g denied 374 U.S. 858 (1963):

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or

> that the Congress has unmistakably so ordained.

There is nothing in the FHLBB regulations which deals with State subrogation laws or the rules of construction of a liability policy. These are the issues upon which this case was decided. Petitioner has cited no decision of this Court or of any Circuit Court which, in any remotely similar context, has found preemption by Federal regulations.

Summary of Argument

The decision of the Court of Appeals for the Fourth Circuit was based upon the doctrine of subrogation and the rules of construction applicable under the laws of the Commonwealth of Virginia. Neither logic nor precedent supports Petitioner's argument that State subrogation law is abrogated by a preemptive provision

which speaks only of State laws directed to the regulation of a Federal association. Indeed, the argument is specious. Had the Petitioner intended that an insured association have no right to subrogation, it need only have inserted an appropriate provision in its policy.

Petitioner has demonstrated no conflict among the Circuits and there is no ground for a writ of certiorari under Rule 17.

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Walkley E. Johnson, Jr.
Counsel of Record

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Dated May 16, 1988

APPENDIX

FEDERAL HOME LOAN BANK BOARD
Peachtree Center Station
P.O. Box 56527
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Atlanta, Georgia 30343
404/522-2450

Office of
Supervisory Agent

September 29,1986

FHLLBB No. 1179

Mr. Edgar S. Everhart
Chairman of the Board
Atlantic Permanent Federal Savings
and Loan Association
740 Boush Street
Norfolk, Virginia 23510

Dear Mr. Everhart:

I am writing this letter to confirm that Atlantic Permanent Federal Savings and Loan Association sent me a copy of the

resolution of its board of Directors adopted July 15, 1985, approving the settlement of the lawsuit styled Gregory, et al v. Atlantic Permanent, et al and authorizing the indemnification of current officers and former officers of the association for their cost of defense and settlement and that the Federal Home Loan Bank Board did not raise any objection to that indemnification under Section 545.121 of Subchapter C, Chapter V, Title 12, Code of Federal Regulations, and does not intend to raise any such objection.

Sincerely,

Robert J. Cohrs
Supervisory Agent